IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 2309 OF 2006.

M/s.Jayabharat Credit Ltd.
a Company incorporated under the
provisions of the Companies Act,
1956, having its Regd.Office at
Solitaire Park, 2nd floor, Bldg.
No.5, 151, Vasanji Road, Chakala,
Andheri (E), Mumbai 400 903,
through its authorised represen-
-tative and Asstt.Vice President
Mr.Atmaram Sriram Chaudhary. ... Applicant.

Versus.

1. Mr.Kadar Hassan Mohd.Sultan,
   Age 50 years, having his address
   at Kismat Trading School, Pokar
   Mansion, N.J.Acharya Marg,
   Chembur, Mumbai 400 071.
   (Org.Accused No.2)

2. Mr.H.M.Qwaza Mohinudduin
   having his address at Room No.2,
   Mariam Mansion 12th Road,
   Chembur, Mumbai 400 071.
   (Org.Accused No.1)

3. The State of Maharashtra. ... Respondents.

Shri S.A.Sawant i/by M/s.B.K.Barve & Co., for the Applicant.

Shri Shrikant Gavand with Shri Bimal Bhabhda i/by M/s.Apte & Co. for the Respondents Nos.1 and 2.

Mrs.M.M.Deshmukh, A.P.P. for the State.

CORAM : ABHAY S.OKA, J.

DATED : 29th November, 2006.

ORAL JUDGMENT.:

1. I have extensively heard the submissions of the

learned Counsel appearing for the Applicant and the learned Counsel appearing for the Respondents. This is an application for grant of leave to prefer an Appeal against an order of acquittal passed by the trial Court. The Applicant-company is the complainant in a Complaint filed under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the said Act of 1881) against the Respondents. The complaint has ended in an acquittal.

2. The submission of the learned Counsel for the Applicant is that it is very clear from the deposition of D.W.1 (Accused No.2) that the liability for which the cheque was issued was very much in existence and was admitted. He submitted that there was a presumption under section 139 of the said Act of 1881 which has been completely ignored by the learned trial Judge. He submitted that the alleged payments which are reflected in the evidence of D.W.1 are not at all in connection with the hire purchase agreements with which the complaint is concerned. He pointed out that the 2nd Respondent was a guarantor in case of other six hire purchase agreements and for rebutting the presumption under section 139 of the said Act of 1881, the Respondents have not led any evidence to show that the payments which are allegedly made by them relate to the two hire purchase agreements which are referred to in

the complaint. He pointed out that even according to the case of the 2nd Respondent made out in his evidence, till the year 2005, the Respondents went on paying different amounts which shows that the liability was admitted. He submitted that the 2nd Respondent being a guarantor was liable to pay the dues payable by the 1st Respondent as the liability of guarantor is coextensive with the principal borrower i.e. the 1st Respondent who was the hirer. He submitted that the cheque in dispute was issued in discharge of the liability of the Respondent No.1/Accused No.1 as the Respondent No.1 had committed default in payment of instalments and the cheque was issued by Respondent No.2 to honour his liability as a guarantor. The learned Counsel appearing for the 1st and 2nd Respondents supported the impugned order. He pointed out that some of the documents annexed to the Application for leave do not form part of the record of the trial Court and in any case, the same are not exhibited by the trial Court.

3. I have considered the submissions. I have perused the record and proceedings. A perusal of the complaint filed by the Applicants shows that the reliance has been placed on the two hire purchase agreements bearing No.12990 and 12991 executed by the 1st Respondent borrower on 31st March 1999. The said agreements relate to the two vehicles which are

described in the complaint. The 2nd Respondent is the guarantor who guaranteed the repayment of the amount advanced to the 1st Respondent. In paragraph 3 of the complaint, the Applicant has come out with a case that in discharge of the dues payable by the Respondent No.1 under the aforesaid two hire purchase agreements, the Respondent No.1 handed over cheque dated 23rd March 2005 in the sum of Rs.25,21,181/- to the Applicant. The said cheque was signed by the Respondent No.2. The said cheque was dishonoured and therefore, a statutory notice was issued on 1st April 2005 by the Applicants. The Respondent No.1 received the same on 9th April 2005 and the Respondent No.2 received the same on 11th April 2005. In the complaint, a reply issued on 21st April 2005 by the 1st Respondent has been referred to.

4. In the evidence of P.W.1 (the authorised representative of the Applicants) it is stated that monthly instalments were to be paid for 23 months by the 1st Respondent. The said witness proved in evidence the two hire purchase agreements at Exh.P4 and P5. He stated in evidence that on 23rd March 2005, there was a meeting between the Accused and the Complainant and it was ascertained that a sum of Rs.25,21,181/- was the amount outstanding against the Accused. He stated that the Accused had handed over a cheque to the Complainant. On 23rd March 2005, he filled the name of the

Complainant in the cheque and the date and amounts were filled in by someone who accompanied the Accused. Though there is a reference to the statutory notice dated 1st April 2005 in the deposition, it is not stated that the said notice was produced on record. In any event the said notice was not proved in his evidence. In the cross-examination, the said witness stated that the accused paid instalments upto January 2001. Later on he corrected himself by saying that the Accused did not pay instalment upto January 2001. In the cross-examination he admitted the notice dated 23rd March 2005 sent by the Applicant to the Accused which was marked as Exh.P10. He also admitted of having received a reply to the said notice. The reply was marked as Exh.P11. He also admitted that the statement of account which was sought by the reply was not provided to the Accused. He, however, stated that he was producing the statement of account with a copy to the Accused which was marked as Exh.P13. He admitted that number of instalments paid by the Accused were not mentioned in the statement of account at Exh.P13. He also admitted that on 15th November 2003 and 22nd November 2003 the vehicles given on hire purchase to the Respondents were repossessed by the Applicant. He referred to certain further payments made by the Accused totally amounting to Rs.75,601/-. He stated that in this transaction the Applicant had not received any

payment of Rs.8 lakhs, Rs.5 lakhs and Rs.2.5 lakhs on 20th July 2001, 1st August 2001 and 20th July 2001 respectively. He denied that the Applicant received payment of Rs.7.5 lakhs in cash on 20th July 2001. He admitted that the price of the vehicles which were repossessed by the Applicant was neither credited to the Accused nor is reflected in the statement at Exh.P13.

5. D.W.1 (Respondent No.2) admitted of having executed two agreements on 31st March 1989. He referred to the payments made of the sum of Rs.70,000/- and Rs.50,000/- by two demand drafts, four cheques of Rs.32,800/- each as well as amounts of Rs.2,5 lakhs, Rs.8 lakhs and Rs.5 lakhs by demand drafts. He stated that he handed over the said demand drafts to the Applicant for releasing his vehicles and the Applicants received the said demand drafts. At that stage, in the deposition, the learned trial Judge has recorded a statement of the Advocate appearing for the Applicant to the following effect:

> "Advocate Barve states at the bar that the complainant had received Rs.15.50 lacs by these 3 demand drafts."

The witness stated that though the said amounts were paid for releasing the buses, in fact the buses were not

released. He referred to the certain payments made in cash in the year 2003, 2004 and 2005 by stating that the said payments were made as per the advise of the Applicant for release of the buses. He stated that he had issued a blank cheque to the Applicant as the cheque was demanded for payment of the insurance premium. He stated that the amount and the date was kept blank and the name of the payee was also blank. In cross-examination he admitted that he was a guarantor for the total eight vehicles. He denied various suggestions given to him in the cross-examination. He reiterated in the cross-examination that the amount on the impugned cheque was not filled in by him but the cheque is signed by him.

6. The perusal of the record shows that a copy of the demand notice dated 1st April 2005 which is the basis of the complaint has not been produced at all. This is a serious lacuna in the case of the prosecution. Exh.P10 is notice dated 23rd March 2005 in which it is stated by the Advocate for the Applicant that the total dues payable by the Respondents as on 23rd March 2005 were Rs.23,82,399/-. The said notice which is issued on 23rd March 2005 does not refer to the any cheque dated 23rd March 2005 signed by the 2nd Respondent. The said notice does not refer to any meeting held on the same day. As pointed out earlier, P.W.1 stated in his

evidence that a meeting was held on 23rd March 2005 when the amount payable by the accused was ascertained at Rs.25,21,181/-. In the deposition he has further stated the cheque was already handed over to the Applicant and he himself filled the name of the Applicant on that cheque and the date and the amount was filled in by some person accompanied by the Accused. All these facts disclosed in the examination-in-chief which have allegedly happened on 23rd March 2005 are not at all disclosed in the said notice dated 23rd March 2005. The said notice does not state that a blank cheque which is the subject matter of the complaint was in the custody of the Applicant as on 23rd March 2005. A perusal of the cross-examination of D.W.1 shows that not even a suggestion was given to him that a meeting was held on 23rd March 2005 in his presence when the sum of Rs.25,.21,282/- was ascertained. No suggestion is given to him that the date and amount in the blank cheque was filled in by any particular person accompanying him. A reply was sent to the notice dated 23rd March 2005 on 1st April 2005 by the Advocate of the Respondents. The said reply at Exh.P11 mentions the date of reply as 4th April 2004. The said date appears to have been obviously put by mistake as in the cross-examination of P.W.1, he has accepted that Exh.P11 is the reply to Exh.P10. In the said reply (Exh.P11) Advocate for the 2nd Respondent stated that according to his client the

entire amount due and payable was already paid to the Applicant and no amount was due and payable. By the said reply, apart from other documents, the Advocate demanded a copy of the statement of accounts. It is also pointed out that there were errors and discrepancies in the statements forwarded by the Applicant from time to time and there were serious discrepancies and errors in the demand made in the notice. P.W.1 has admitted that after receiving the said reply, a copy of the statement of accounts was not forwarded to the 2nd Respondent. The reply to the notice dated 1st April 2005 is at Exh.P9. In the said reply, the Advocate for the 1st Respondent has referred to the earlier notice dated 23rd March 2005 and the reply to the said notice. It is asserted that no amount is due and payable by the the 1st Respondent. The reply also refers to the fact that the statement of account was not supplied though called upon by reply dated 4th April 2004.

7. It is pertinent to note that in the complaint no assertion has been made as regards the holding of the alleged meeting on 23rd March 2005 in presence of the Respondents and the alleged ascertainment of the exact amount allegedly due and payable. There is no reference in the complaint that a blank cheque was already in the custody of the Applicant and on 23rd March 2005 name of

the payee was filled in by P.W.1 and the date and amount was filled in by a person accompanying the Respondents. The said version comes out for the first time in the examination-in-chief of the P.W.1. The said case is not put to D.W.1 in his cross examination. All this does not find place in the notice dated 23rd March 2005. Though a zerox copy of the notice dated 1st April 2005 is annexed to the application for leave, I find that the said notice is neither produced nor exhibited. However, since the Applicant has relied upon the same in this Application, if it is looked into, the said notice is conspicuously silent about the meeting held on 23rd March 2005. As stated earlier, the demand made in the earlier notice dated 23rd March 2005 (Exh.P10) was in the sum of Rs.23,82,399/- as on that date. The alleged notice which is annexed to the application shows that on 23rd March 2005, the liability was Rs.25,21,181/-. Again the theory of meeting and ascertainment of the claim and filling of the blanks in the cheque is not at all pleaded in the said notice. In the deposition of D.W.1, the statement of the Advocate appearing for the Respondents has been recorded accepting that the Applicant had received a sum of Rs.15.50 lakhs by three demand drafts. The said statement is not qualified by saying that the said amount is paid in respect of the six other transactions. Obviously the statement of the Advocate is in connection with the two hire purchase

Agreements which are the subject matter of the complaint. By reply dated 4th April 2005, a demand was made by the 2nd Respondent for supply of the statement of account. Admittedly the statement of account was not supplied till it was produced in the Court during the cross-examination of P.W.1. The said statement is at Exh.P13 in which details as regards amount advanced, instalments payable, hire amounts received, hire amount outstanding, compensation on delayed payment are mentioned. The said statement of account does not contain the specific entries of the amounts paid by the Respondents from time to time. The said statement does not disclose whether the sum of Rs.15.50 lakhs is accounted for by the Applicant. It is also pointed out that the vehicles were repossessed by the Applicant. P.W.1 admitted that the price of the vehicles repossessed by the Applicant is not reflected in the said statement of account. Exh.P13 has seen the light of the day only during the cross examination of P.W.1. Thus a serious doubt is created about the existence of liability. The primary evidence was the loan account maintained by the Applicant containing entries of the amounts received by the Applicant from time to time, price of the vehicles repossessed by the Applicant etc. However, extract of the loan account was not produced by the Applicant.

8. The presumption under section 139 of the said Act of 1881 is held to be a rebuttable presumption. It is well settled that for rebutting the presumption it is not necessary for the Accused to step into the witness box. The presumption is not required to be rebutted by establishing facts beyond reasonable doubt. The presumption can be rebutted by preponderance of probability.

9. Apart from the basic lacuna in the case of failure to produce and prove the demand notice dated 1st April 2005, the circumstances set out in paragraphs 6 and 7 are more than sufficient to rebut the presumption under section 139 of the said Act of 1881. Though an opportunity was available, the Applicant did not lead evidence by producing the certified extracts of the loan account of the 1st Respondent. The learned trial Judge has recorded a finding on the basis of the evidence of P.W.1 that blank cheque lying with the Applicant has been misused. The said finding cannot be said to be contrary to record. It is certainly a possible conclusion which could have been drawn after appreciating the evidence on record.

10. If two views are possible, while deciding an appeal against acquittal, the view which is in favour of the Accused has to be accepted. The sum and substance

of the discussion made is that the view which is taken by the learned trial Judge is certainly a possible view which could have been taken on the basis of the evidence on record. Even assuming that another view is possible to be taken, is no ground for interfere in an appeal against acquittal. It is well settled that the presumption of innocence is further strengthened in view of the acquittal of the Respondents. There is no merit in the Application and the same is dismissed.

Judge.